Supreme Court, U.S.
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No. 86-5-CFX

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

GREGORY R. ALLUSTIARTE, et al.,
Petitioners,

v.

W. AUSTIN COOPER, Trustee for
BEN W. ALLUSTIARTE and LINDA M. ALLUSTIARTE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OPPOSING THE PETITION FOR WRIT OF CERTIORARI

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Trustee in persona propria

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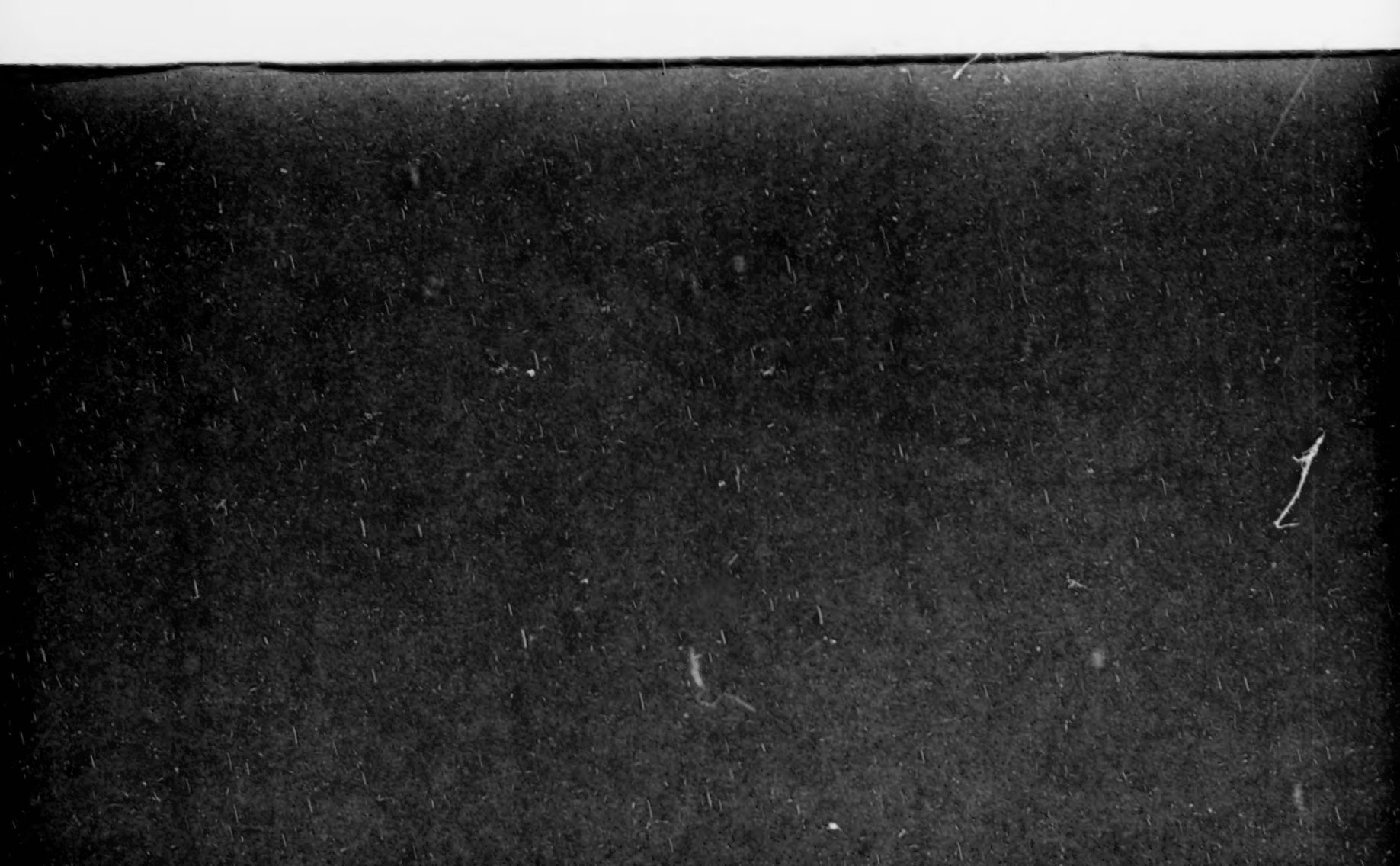

QUESTION PRESENTED

Respondent does not believe any significant question warranting review by this court has been presented by petitioner.

CERTIFICATE OF INTERESTED PERSONS

The Trustee of the Allustiarte Estates in Bankruptcy, W. Austin Cooper, has reviewed the Petition for a Writ of Certiorari and notes that notwithstanding the fact that the Petitioner, Gregory R. Allustiarte, alleges that the Petition is being filed on behalf of himself and his siblings, the only signatory is Gregory R. Allustiarte. Gregory R. Allustiarte is not an attorney. Therefore, it appears to the Trustee that only the following are interested persons:

1. Petitioner ..... Gregory R. Allustiarte
2. Respondent ..... W. Austin Cooper, Trustee

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

W. Austin Cooper, Trustee of Ben W. Allustiarte and Linda M. Allustiarte's Estates in Bankruptcy (hereinafter "Trustee") hereby respectfully opposes the petitioners Petition for a writ of certiorari.[1]

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[1] Petitioner has correctly provided this Court with the citation to the Order which he desires reviewed.

JURISDICTION

Petitioner has properly informed this Court of the statutory basis of jurisdiction. However, as implicit in the Trustee's Certificate of Interested Persona, *supra*, the first footnote of Petitioner's brief is grossly inaccurate. The Petitioner is not an attorney, and is not capable of representing the individuals listed in his first footnote, other than himself.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Trustee believes that none of the Constitutional and Statutory provisions relied upon by Petitioner are pertinent to this Petition. Petitioner, his siblings below, and the debtors were found to be unworthy of belief by the bankruptcy court judge during the course of the trial. The factfinder, having found the Petitioner unworthy of belief and relying on other testimony and on the documentary evidence that was available simply ruled that the Trustee had carried his burden. Having so ruled, a judgment adverse to Petitioner was entered by the trial court below.

STATEMENT OF THE CASE

The Debtors' bankruptcy petitions were filed on August 15, 1979, not August 16, 1979 as Petitioner states, in the Eastern District of California. This was the Debtors' second filing, the first having occurred on June 24, 1974. The earlier Bankruptcy Petitions were dismissed by an Order entered by the Bankruptcy Judge on August 29, 1975. The Order was appealed and became final on August 14, 1979 when the Debtors withdrew their Petition for Writ of Certiorari.

The Trustee disputes that in fact a finding was ever entered in this case that stated that the Debtors are farmers. It is true that the Debtors have engaged in some farming and ranching, and it is also true that Petitioner, his siblings and the Debtors have repeatedly asserted that the Debtors are "FARMERS". However, there has never, to the Trustee's knowledge, been an actual adjudication of the Debtors' status. Therefore, while the Debtors may allege they are "FARMERS" they have not been found to

be "FARMERS" and absent such a finding are proper candidates for liquidation or an arrangement of liquidation.

The adversary proceedings initiated by the Trustee resulted in the Ninth Circuit's opinion. In the adversary proceedings the Trustee sought the return of assets which were alleged to have been transferred away by the Debtors to their children. The former Trustee argued below, and the Bankruptcy Court concurred, that essentially the Debtors attempted to thwart creditors and leave a legacy for their children by incurring debts and transferring valuable assets to their children. Petitioner, one of Debtors' children, is now complaining because the courts have undone the Debtors' schemes.

Petitioner, at this late date informs *this* court . . . "[w]hile awaiting the Order from the Ninth Circuit Court it was discovered that the bankruptcy judge and the trustee have been in violation of Federal Law. . . ." The so-called improper contacts between the former Trustee and the Bankruptcy Court judge were fully disclosed in early 1985. In fact the Debtors' attorney was served with a copy of the former Trustee's fee applications on May 21, 1985. The information which is incorrectly summarized by Petitioner was disclosed in that fee application. The Trustee shall provide one example to illustrate just how misleading Petitioner's document which is labeled "APPENDIX D" is. The fourteenth entry in Petitioner's "APPENDIX D" caught the Trustee's attention. A 5.7 hour telephone conference seemed inordinately lengthy. Petitioner's entry numbered 14 in "APPENDIX D" reads as follows:

"14.	01/18/82	Telephone Conference Loeffler and with Judge Dahl	5.7 hrs.

The entry which was actually in the above-described fee application of the former Trustee read as follows:

1/18	4	Preparation for trial on 1/9/81 [sic.] and 1/20/82; multiple telephone conferences with Mr. Loeffler and Judge Dahl re trial on 1/19/82	5.7 hrs.

The Trustee's review of the record discloses that the "M. LOEFFLER" referred to in that entry was an attorney for Petitioner and his siblings. Thus the communications with the trial court judge by conference call with the attorney for the Petitioner and his siblings below was proper.[2]

Insofar as Petitioner implies that the denial of his "Petition for Rehearing and Suggestion for Rehearing En Banc" somehow operated to deny Petitioner his right to appeal, Petitioner is mistaken. Neither this Court, nor the Circuit Court need maintain an open forum for this Petitioner in order to entertain whatever argument that *Petitioner* may conjure up.

REASONS FOR DENYING THE PETITION

The opinion which Petitioner seeks to have this Court review contains no constitutional question meritorious of review by this Court. The so-called "categorical Rejection of All Testimony . . ." was by no means improper. The Court will note that the opinions cited by Petitioner, *Yip Mie Jork v. Dulles*, 237 F.2d 383 (9th Cir. 1956); *Louie Poy Hok v. Nagle*, 48 F.2d 753 (9th Cir. 1931); and *Gung You v. Nagle*, 34 F.2d 848 (9th Cir. 1929), simply are inappropriate here. In this case the rejection of the debtors' testimony, which testimony benefitted their children, and the rejection of the testimony offered by Petitioner and his siblings, which testimony was self serving and otherwise without unbiased corroboration, clearly differs from the witnesses whose testimony was initially rejected in the cases cited, *supra*. In the above-cited cases, all immigration cases, the courts essentially stated, "[t]his Court has on numerous occasions held that the trier of fact need not accept uncontradicted testimony when good reasons appear for rejecting it, *such as the interest of the witness*, and improbabilities and important discrepancies." [footnotes

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[2] The issues regarding so-called improper contacts between the former Trustee and the Bankruptcy Judge are currently being briefed for argument in the Allustiartes' appeal of the former Trustee's Fee Application. The appeal is before the United States District Court for the Eastern District of California.

omitted] *Yip Mie Jork v. Dulles*, *supra* at 385. (Emphasis added.)

Petitioner's argument respecting the so-called "mechanically adopted" findings of fact was presented verbatim (plus or minus a few typographical errors which appear in the instant petition) to the Ninth Circuit at page 27 and 28 to Petitioner's Opening and Answering Brief filed May 15, 1985. The matter was briefed by the counsel for the Trustee and the Circuit Court has already considered and rejected the identical argument posed by Petitioner here.

This case has concluded with the issuance of a Circuit Court opinion which is not novel and does not "so far depart[ ] from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 17.1(a), Rules of the Supreme Court of the United States. Therefore, the Trustee believes this Court should properly refrain from issuing the writ of certiorari which Petitioner seeks.

In the event that this Court is undecided at this point as to whether in fact a writ of certiorari should issue, the Trustee wishes to bring to this Court's attention the fact that the Trustee was served with a document on or about July 2, 1986 which is titled "Notice of Appeal Supreme Court of the United States." A copy of said document is reproduced as Addendum "A". Therefore, the Trustee wishes to alert the Court that Petitioner herein shall be shortly appearing in this Court as an "APPELLANT" as well.

CONCLUSION

This Petitioner, in persona propria, has been involved in the Bankruptcy filings of the debtors, his parents, for over 5 years. The basic tactics employed has been to delay the payment of creditors, some of whom have not been paid since the late 1960's. The Trustee respectfully requests that this Court deny the Petitioner's Petition for a writ of certiorari.

COOPER & SHAFFER

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Trustee of the Ben W. Allustiarte and Linda M. Allustiarte Estates in Bankruptcy
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Addendum A

GREGORY R. ALLUSTIARTE, ET AL.,
GREGORY R. ALLUSTIARTE TRUST
BENJAMIN A. ALLUSTIARTE TRUST
MARIANNE ALLUSTIARTE TRUST
1021 Stanford Avenue
Modesto, California 95350
Telephone: (209) 523-0234

Allustiarte Trust Beneficiaries,
Individuals and Spouses
Gregory R. Allustiarte
Benjamin A. Allustiarte
Marianne Allustiarte Pack

BKS 79-3763-D-XII
BKS 79-3764-D-XII
CA #84-1993
CA #84-2029
DC #S-81-10-RAR
Eastern California

United States Court of Appeals
For the Ninth Circuit

In re
Ben W. Allustiarte and Linda M. Allustiarte,
Debtors.

W. Austin Cooper, as Trustee of
Ben W. Allustiarte and
Linda M. Allustiarte,
Plaintiff/Cross-Appellant
vs.
Gregory R. Allustiarte, etc. et al.,
Defendants/Appellants

NOTICE OF APPEAL
SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN: Gregory R. Allustiarte, et al., hereby appeals the "Opinion" entered April 7, 1986, and "Order" entered May 28, 1986 by the U. S. Court of Appeals for the Ninth Circuit to the Supreme Court of the United States.

DATED: June 30, 1986

/s/ GREGORY R. ALLUSTIARTE
Gregory R. Allustiarte, et al.,
Power of Attorney for Beneficiaries